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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
BOBBY BRANDON,	)	
Employee	)	OEA Matter No. J-0043-19
	)	
v.	)	Date of Issuance: January 21, 2020
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF	)	
EDUCATION,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE
_____	)	
Bobby Brandon, Employee <i>Pro-Se</i>	)	
Hillary Hoffman-Peak, Esq., Agency Representative	)	

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On April 3, 2019, Bobby Brandon (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the Office of the State Superintendent of Education’s (“OSSE” or the “Agency”) adverse action of summarily removing him from service. Employee’s last position of record was Bus Attendant. OSSE asserts that Employee “was tasked with the responsibility of rider safety, care and support, specifically assisting with the daily transport of special needs students to and from school.”<sup>1</sup> On November 2, 2018, Employee engaged in prohibited conduct when he allegedly assaulted a special needs student that was in his care.<sup>2</sup> Agency avers that this conduct constituted Assault as defined in D.C. Official Code § 22-404. In its Notice of Summary Removal dated November 2, 2018, Agency maintains that Employee’s conduct violated the following sections of OSSE’s Policies and Procedure Manual: §

<sup>1</sup> OSSE Prehearing Statement pp. 1 – 2. (May 23, 2019).

<sup>2</sup> The student in question will not be identified in this Initial Decision. Rather, he will be referred to as ‘the student’ in order to protect his privacy.

703.3(A)(21)<sup>3</sup>; § 703.3(A)(14)<sup>4</sup>; § 703.3(A)(26)<sup>5</sup>; § 703.3(A)(22)<sup>6</sup>; § 703.3(A)(25)<sup>7</sup>; § 201.3<sup>8</sup>; and, § 703.3(A)(1)<sup>9</sup>. On January 16, 2019, OSSE informed Employee, in writing, that it was sustaining Employee's summary removal.

Employee's Petition for Appeal, on first read, appeared to be untimely. However, Employee successfully noted that Agency provided an incorrect address and contact information for OEA in its January 16, 2019, letter. Noting this error, Employee's appeal was allowed to proceed on its merits. On May 9, 2019, a Prehearing Conference was held in this matter. During the Prehearing Conference, the Undersigned noted that an Evidentiary Hearing was required in order to make appropriate findings of facts and conclusions of law. An Evidentiary Hearing was held on August 15, 2019. Thereafter, both parties submitted their written closing arguments. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

### JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

### BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

### ISSUES

Whether the Agency's adverse action was taken for cause. If so, whether the penalty was

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<sup>3</sup> Violation of any Federal, State or District of Columbia law or ordinance.

<sup>4</sup> Prohibition against use of Corporal Punishment.

<sup>5</sup> Conduct prejudicial to good order.

<sup>6</sup> Conduct that constituted disrespect toward a student with a disability.

<sup>7</sup> Failure to safely deliver a student to the designated receiving party.

<sup>8</sup> Dereliction of duty.

<sup>9</sup> Employee allegedly concealed material facts in his written and oral response to OSSE investigators responding to the incident.

appropriate under the circumstances.

### Summary of Relevant Testimony

*Patrice Bowman ("Bowman") Tr. pp 10 – 32*

Bowman testified in relevant part that she works for OSSE's Department of Student Transport as its Associate Director of Operations.<sup>10</sup> Her on-the-job duties consist primarily of oversight of bus terminal operations including bus and management staff. Of note, the use of OSSE school buses is exclusively reserved for students with physical, mental or emotional disabilities or special needs. Her on-the-job duties include conducting training and imposing discipline for the employees under her purview. Bowman authored Agency's Exhibit No. 1 which is the Notice of Summary Removal for Employee.<sup>11</sup> Bowman testified that in coming to the decision to support Employee's removal from service, she viewed video camera footage that showed Employee roughly manhandling a student in his care.<sup>12</sup> Bowman identified Agency's Exhibit No. 2 as a Policy and Procedures Manual ("Manual") that governs how OSSE employees are supposed to conduct themselves on-the-job. Bowman indicated that this manual was first disseminated to Agency employees prior to the creation of OSSE. She further explained that a copy of this Manual was given to all Agency employees in hardcopy and a copy was presented digitally via e-mail. Bowman also maintained that she conducted numerous all staff meetings where the Manual was discussed, disseminated and explained.<sup>13</sup> Also, according to the Code of Conduct as cited in the Manual, corporal punishment is strictly prohibited. Bowman further explained that corporal punishment occurs "when an individual harms an individual outside of just regular interaction..."<sup>14</sup> When found guilty of corporal punishment, the only recourse, from Agency's perspective, is removal from service. Bowman identified Agency Exhibit No. 3 as the Final Agency decision for Summary Removal. It was signed by OSSE Director Gretchen Brumley. According to this exhibit, Agency opted to sustain Employee's removal from service due to the assault he committed on a student.

*Sylvester J. Pleasants ("Pleasants") Tr. pp. 32 – 58*

Pleasants testified in relevant part that he is employed by OSSE's Division of Transportation as an Investigator. Pleasants generally investigates school bus accidents and other transportation concerns.<sup>15</sup> Pleasants identified Agency Exhibit No. 4 as an email sent to him in which he was first alerted that he was one of the investigators assigned to look into the incident in question. As part of his investigative efforts into this matter, he went to Marie H. Reed Elementary School ("Reed ES") where the incident occurred. While there, he viewed closed-circuit video footage of the incident. Pleasants explained that Agency Exhibit No. 5 is video footage of

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<sup>10</sup> Tr. pp. 10-11.

<sup>11</sup> Tr. p. 12.

<sup>12</sup> Tr. pp. 11 -14.

<sup>13</sup> Tr. pp. 15 – 23.

<sup>14</sup> Tr. p 22.

<sup>15</sup> Tr. p 33.

Employee assaulting a special needs student as they both walked from the school bus, parked curbside, to the Reed ES front lobby.<sup>16</sup> Upon review of the video footage, Pleasants was able to positively identify Employee as the person assaulting/manhandling the student.<sup>17</sup> Pleasants identified Agency Exhibit No. 6 as a “transportation concern” which is in essence the investigatory notes and findings gathered by OSSE investigators which is then logged into their computer system for preservation and review. Pleasants indicated that OSSE investigators interviewed three persons: Assistant Principal Giron, Security Guard Marquisha Jones and Principal Katie Lundgren. Giron and Jones witnessed Employee assaulting/manhandling the student first-hand. Pleasants investigation uncovered that Employee had a tense verbal exchange with the student where the student allegedly verbally disrespected Employee. In response, Employee grabbed and shoved the student into the front lobby of Reed ES where Giron and Jones were stationed at a guard desk. Once at the desk, the terse exchange continued, and Employee briefly grabbed/shook the student before the two were separated by Giron and Jones.<sup>18</sup>

*Warren Lewis (“Lewis”) Tr. pp. 58 - 73*

Lewis testified in relevant part that he works for OSSE, Business Transportation – Office of Investigations as its Lead Investigator. Similar to Pleasants, he is charged with conducting investigations into school bus crashes and other incidents involving school buses or OSSE staff.<sup>19</sup> Lewis recognized Agency Exhibit No. 6 as an investigative report of the incident in question. Lewis interviewed Employee about this incident and Employee shared with him that during the bus route it started quietly, however, employee made a comment to the student that angered the student. Employee then shared with him that the student became verbally hostile using profane language. Employee responded by grabbing his arm and directing him toward the Reed ES lobby guard desk. During this interview, Employee told Lewis that he only grabbed/touched the one time while approaching the front walkway into Reed ES lobby. However, after the interview, Lewis reviewed the video footage and noted that Employee grabbed/manhandled the student more than once. During the Evidentiary Hearing, Lewis reviewed the video footage and noted that Employee grabbed/pushed/shook the student on more than one occasion.<sup>20</sup> Lewis asked Employee why he did not follow protocol and Employee told him that he is “from the old school.”<sup>21</sup>

*Bobby Brandon (“Employee”) Tr. pp. 73 - 88*

Employee testified in relevant part that on November 2, 2018, while curbside walking from the school bus to the Reed ES school lobby, he asked the student “why are you stealing candy from yourself?” due to the student taking candy from his backpack and putting it into his pants pockets.<sup>22</sup> The student became agitated and started using profanity. Employee admits that he grabbed his arm and directed him towards the lobby. According to Employee, when they approached the guard

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<sup>16</sup> Tr. pp 38 – 41.

<sup>17</sup> *Id.*

<sup>18</sup> Tr. 47 – 51.

<sup>19</sup> Tr. at 58.

<sup>20</sup> Tr. 63 – 66.

<sup>21</sup> Tr. p. 65.

<sup>22</sup> Tr. p. 74.

desk in the lobby, the student became more agitated and was “climbing on top of him.”<sup>23</sup> That’s when Giron and Jones came from behind the desk to separate Employee and the student. Employee then recounts that later that day, he was interviewed by Lewis during which he said that he told Lewis he had grabbed the student twice.<sup>24</sup> During cross examination, Employee was handed Agency Exhibit No. 7, which is an arrest warrant. Employee appeared for court as mandated and admitted that he pleaded guilty to Simple Assault in this matter.<sup>25</sup>

#### FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of Employee’s appeal process with this Office. Chapter 16 of the District Personnel Manual (“DPM”) outlines the basis for instituting a summary removal as follows:

**1616.1** An employee may be summarily suspended or removed from his or her position, notwithstanding §§ 1613 and 1614.

**1616.2** An employee may be suspended or removed summarily when his or her conduct:

- a. Threatens the integrity of District government operations;
- b. Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or
- c. Is detrimental to the public health, safety, or welfare.

As was noted *supra*, Employee was summarily removed on November 2, 2018, due to egregious conduct wherein, Employee roughly handled, shook and assaulted a special needs student in his temporary care. I find that this conduct fits squarely within the rubric of DPM 1616.2 (b). Bowman, Pleasants and Lewis credibly testified that they viewed Agency Exhibit No. 5 and saw Employee manhandle and assault the student prior to entry into Reed ES as well as when Employee presented the student at the guard desk. Employee’s conduct was of such a magnitude that Giron and Jones had to physically separate Employee from the student. Lewis and Pleasants conducted an investigation into this incident and Employee’s assault of the student was corroborated by Giron and Jones. What is more concerning is that Lewis interviewed Employee during which Employee attempted to conceal the second assault that occurred at the guard desk. During the Evidentiary Hearing, the Undersigned viewed the video footage that comprised Agency Exhibit No. 5 and I find that Employee’s conduct is inexplicable. The video footage clearly depicts the first assault where Employee roughly grabs the student by the arm and backpack. The assault continues when Employee presents the student at the Reed ES guard desk and continues the assault/manhandling by roughly grabbing and shaking the student by his arms and backpack. Employee at first tries to deny the assault; however, when confronted with video footage he then

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<sup>23</sup> Tr. p. 75.

<sup>24</sup> Tr. p 77

<sup>25</sup> Tr. pp. 83 – 86.

apologized for his actions and attempted to explain that he was temporarily overcome (emotionally) by the student's profane verbal barrage. I also note that Agency Exhibit No. 7 clearly notes that Employee pleaded guilty to Misdemeanor Simple Assault on April 24, 2019 in the District of Columbia Superior Court.

The Undersigned notes that the video footage along with the consistent and credible testimony of Bowman, Lewis and Pleasant, substantiates Agency's removal action. Additionally, Employee's admission both during the instant proceeding as well as before the District of Columbia Superior Court also, substantiates Agency's removal action.<sup>26</sup> The substantiated assault of a student is reprehensible and in the context of this removal action, unforgivable. I find that OSSE has met its burden of proof relative to all of the charges levied against Employee herein.

#### Appropriateness of the Penalty

When assessing the appropriateness of the penalty, OEA is not to substitute its judgment for that of the agency. *Stokes v. District of Columbia*, 502 A.2d 1006, 1985 (D.C. 1985). The OEA itself recognized in *Employee v. Agency*, 29 D.C. Reg. 4565, 4570 (1982):

Review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for this Office to specify how the Agency's penalty should be amended. This office is guided in this matter by the principles set forth in *Douglas v. Veterans Administration*, [supra].

Although the OEA has a "marginally greater latitude of review" than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. *Douglas v. Veterans Administration*, supra, 5 M.S.P.B. at 327-328. The "primary discretion" in selecting a penalty "has been entrusted to agency management, not to the [OEA]." *Id.* at 328.

Selection of an appropriate penalty must . . . involve a responsible balancing of the relevant factors in the individual case. The [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it

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<sup>26</sup> The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof. See *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

*Id.* at 332-333. *See also Villela v. Department of the Air Force*, 727 F.2d 1574, 1576 (Fed. Cir. 1984).

Employee presented himself as emotionally overcome by the verbal abuse from one of his students. Moreover, instead of relying on common sense and good order, Employee opted to respond violently to this verbal barrage. This conduct was so egregious that Employee pleaded guilty to Misdemeanor Simple Assault. Given the instant facts, I find that Employee's summary removal was well within the range allowed by law and applicable District government regulations.

### ***Conclusion***

On Petition for Appeal, Agency has the burden of proof with regard to material issues of fact based on a preponderance of the evidence. As previously stated under OEA Rule 628.1, preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." During the evidentiary hearing, I found the collective testimony of Agency's witnesses to be both credible and persuasive. I further find that Employee's denial of sanctionable activity or feigned ignorance of work place policy and procedures during his testimony to be self-serving and dismissive. Accordingly, I find that OSSE has met its burden of proof with regard to all the charges detailed in this matter. I further find that Agency's action of summarily removing Employee from service should be upheld.

### **ORDER**

It is hereby **ORDERED** that Agency's action of summarily removing Employee from service is **UPHELD**.

FOR THE OFFICE:

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Eric T. Robinson, Esq.  
Senior Administrative Judge